a supplemental brief, to raise a claim he had not previously made to the court of appeals, *i.e.*, that the use of judge-found facts in applying the Guidelines violated the Sixth Amendment. Pet. 4-5; C.A. Docket, entries for 7/6/04, 7/15/04.

The court of appeals granted petitioner's motion to adopt Lewis's motion for leave to file a supplemental brief, Pet. App. 44, but denied his petition for rehearing and his motion for leave to file a supplemental brief, citing circuit precedent establishing that a party may not raise for the first time in a petition for rehearing or in a supplemental brief an issue not raised in his principal brief. See *id.* at 44-45 (citing *United States* v. *Ford*, 270 F.3d 1346, 1347 (11th Cir. 2001), cert. denied, 535 U.S. 1098 (2002); *United States* v. *Ardley*, 242 F.3d 989, 990 (11th Cir.), cert. denied, 533 U.S. 962 (2001) and 535 U.S. 979 (2002); *United States* v. *Nealy*, 232 F.3d 825, 830 (11th Cir. 2000), cert. denied, 534 U.S. 1023 (2001)); *id.* at 55-56.

3. In *United States* v. *Booker*, 125 S. Ct. 738 (2005), this Court held that the Sixth Amendment, as construed in *Blakely*, applies to the federal Sentencing Guidelines. *Id.* at 748-756 (Stevens, J., for the Court). In answering the remedial question in *Booker*, the Court applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for unreasonableness. *Id.* at 757-769 (Breyer, J., for the Court).

4. In *United States* v. *Dockery*, 401 F.3d 1261 (2005) (per curiam), the Eleventh Circuit held, in a case that this Court had remanded for reconsideration in light of *Booker*, that the defendant would be deemed to have abandoned his Sixth Amendment challenge to the Guidelines by failing to raise it in his opening brief. *Id.* at

1262-1263. The court of appeals stated that it saw nothing

> in the Supreme Court's remand order, which is cast in the usual language, requiring that we treat the case as though the * * * issue had been timely raised in this Court. In the absence of any requirement to the contrary in either [*Booker*] or in the order remanding this case to us, we apply our well-established rule that issues and contentions not timely raised in the briefs are deemed abandoned.

Ibid. (quoting *Ardley*, 242 F.3d at 990); accord, *e.g.*, *United States* v. *Mosley*, No. 04-11189, 2005 WL 1317026 (11th Cir. June 2, 2005) (reinstating original judgment after this Court granted certiorari, vacated judgment, and remanded for further consideration in light of *Booker*); *United States* v. *Senn*, 128 Fed. Appx. 96 (11th Cir. 2005) (same).

ARGUMENT

Petitioner contends (Pet. 16-17) that the Eleventh Circuit's decision not to entertain *Booker* and *Blakely* claims that are not raised in a party's initial brief contravenes the retroactivity principle of *Griffith* v. *Kentucky*, 479 U.S. 314 (1987),[4] and is inconsistent with the principles of plain error review embodied in Federal Rule of Criminal Procedure 52(b). Pet. 19-21. Petitioner also contends (Pet. 18-19) that the Eleventh Circuit's position conflicts with "the law in every other circuit." Pet. 18. Finally, petitioner contends (Pet. 5-10) that his petition for a writ of certiorari should be

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[4] This issue has been raised by one of petitioner's co-defendants. See *Tirado* v. *United States*, petition for cert. pending, No. 04-9307 (filed Mar. 15, 2005).

granted, the judgment of the court of appeals vacated, and remanded for further consideration in light of *Booker*. None of those contentions has merit. Further review is not warranted.

1. a. In *Griffith*, this Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases * * * pending on direct review or not yet final." 479 U.S. at 328. Because the petitioner in *Griffith* had preserved the claim on which he sought review, the Court did not have occasion to consider the interplay between the retroactivity rule adopted in that case and principles of waiver, forfeiture, and other prudential doctrines. See *id.* at 317, 318.

Application of procedural default rules is consonant with the retroactivity principle of *Griffith*. *Griffith* concluded that retroactive application of new rules on direct appeal was necessary both because of "the nature of judicial review" and in order to "treat[] similarly situated defendants the same." 479 U.S. at 322-323. That rationale is in no way inconsistent with application of procedural default rules to bar consideration of claims that have not been adequately preserved. Defendants who have not preserved a claim of error are not "similarly situated" (*id.* at 323) to those who have. Cf. *Shea* v. *Louisiana*, 470 U.S. 51, 59-60 (1985) (holding that it is not inequitable to draw a distinction between a defendant who raises a claim on collateral attack and one who raises it on direct review because "[t]he one litigant already has taken his case through the primary system" and "[t]he other has not"). Application of procedural bar rules does not offend principles requiring the retroactive application of new constitutional rules to cases open on direct review.

> Retroactivity doctrine answers the question of which cases a new decision applies to, assuming that the issue involving that new decision has been timely raised and preserved. Procedural bar doctrine answers the question of whether an issue was timely raised and preserved, and if not, whether it should be decided anyway. It makes no more sense to say that a procedural bar should not be applied in this situation because doing so undermines or frustrates retroactive application of a Supreme Court decision, than it does to say that procedural bars should not be applied in any situation because doing so undermines or frustrates the constitutional doctrines and commands underlying the issue that is held to be defaulted.

United States v. *Ardley*, 273 F.3d 991, 992 (11th Cir. 2001) (Carnes, J., concurring in denial of rehearing en banc), cert. denied, 533 U.S. 979 (2002).

On several occasions, this Court has indicated that the retroactivity principle embodied in *Griffith* is in no way inconsistent with the application of procedural default rules. In *Shea* v. *Louisiana*, *supra*, for example, the Court held that the rule announced in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), would be applied retroactively to cases pending on direct review. 470 U.S. at 59. In doing so, the Court explicitly noted that the retroactive application of *Edwards* was "subject, of course, to established principles of waiver, harmless error, and the like." *Id.* at 58 n.4. Similarly, in *Booker* itself, the Court stated that while courts were bound to apply its holding "to all cases on direct review," 125 S. Ct. at 769 (citing *Griffith*, 479 U.S. at 328), "we expect reviewing courts to apply ordinary prudential doctrines," including, specifi-

cally, the plain error doctrine for claims that have not been preserved. *Ibid.* See also *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (noting that rule of *United States* v. *Gaudin*, 515 U.S. 506 (1995), applied retroactively under *Griffith*, but unpreserved claims were subject to review only for plain error); *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 104 n.1 (1993) (Scalia, J., concurring) (noting, as the Court extended the holding of *Griffith* to civil cases, that "a party may procedurally default on a claim in either [the civil or criminal] context").[3] This Court has never suggested the contrary.

b. Petitioner contends (Pet. 19-21) that the decision below is inconsistent with the principles of plain-error review reflected in Rule 52(b) of the Federal Rules of Civil Procedure. That argument lacks merit. As the Court observed in *United States* v. *Olano*, 507 U.S. 725 (1993), "'[n]o procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *Id.* at 731 (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). In *Olano*, this Court observed that Rule 52(b) provides only "a limited power to correct

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[3] Accord, *e.g.*, *United States* v. *Humphrey*, 287 F.3d 422, 442 (6th Cir. 2002) (noting that although *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), applies retroactively to cases on direct review under *Griffith*, unpreserved claims were subject to plain error review); *United States* v. *Oaten*, 286 F.3d 622, 634 (2d Cir. 2002) (same); *United States* v. *Wheat*, 278 F.3d 722, 739 (8th Cir. 2001) (same), cert. denied, 537 U.S. 850 (2002); *United States* v. *Keys*, 133 F.3d 1282, 1285-1286 (9th Cir.) (en banc) (holding that although rule of *Gaudin* applied retroactively to cases on direct review under *Griffith*, unpreserved claims were subject to review only for plain error), cert. denied, 525 U.S. 891 (1998).

errors that were not timely raised in district court." *Ibid.* The Court did not indicate that Rule 52(b) prescribed the *sole* procedural bar rule that courts could employ and that courts could adopt no additional procedural requirements. And in *Booker*, the Court said that it "expect[ed] reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain error' test." 125 S. Ct. at 769 (emphasis added). *Booker*'s language clearly implied that "plain error" is only one of a number of "prudential doctrines" that may preclude relief; waiver is another.

Although this Court observed in *Olano* that "Rule 52(b) should be employed 'in those circumstances in which a miscarriage of justice would otherwise result,'" 507 U.S. at 736 (quoting *United States* v. *Young*, 470 U.S. 1, 15 (1985)), nothing in the Eleventh Circuit's application of its procedural bar rule is inconsistent with that statement. The court of appeals has addressed claims of *Booker* error although they were not raised in the defendant's opening brief where the government has conceded the error. See *United States* v. *Dacus*, No. 04-15319, 2005 WL 1017985, at *1 (11th Cir. May 3, 2005) (per curiam) ("Although we ordinarily refuse to consider an argument not raised in an initial brief, we consider the argument that Dacus's sentence was erroneous under *Booker* because both parties have joined the issue without objection.") (citing *United States* v. *Levy*, 379 F.3d 1241, 1242-1243 (11th Cir. 2004), vacated, No. 04-8942, 2005 WL 540692 (June 6, 2005)). In addition, the Eleventh Circuit has explicitly recognized that it has the authority to relieve litigants of the consequences of failing to raise an issue in an opening brief and to address an issue on the merits where manifest injustice would

otherwise result."[6] The court has specifically determined that "'there would be no miscarriage of justice if we decline to address' *Blakely*-type issues not raised in opening briefs on appeal." See *Levy*, 379 F.3d at 1243 n.3 (quoting *McGinnis* v. *Ingram Equip. Co.*, 918 F.2d 1491, 1496 (11th Cir. 1990)).

2. Petitioner contends (Pet. 18-19) that the Eleventh Circuit's application of its procedural bar rule conflicts with the law of every other courts of appeals, and that Supreme Court review is necessary to resolve the circuit conflict.

a. The Federal Rules of Appellate Procedure provide that an appellant's brief "must contain * * * appellant's contentions and the reasons for them." Fed. R. App. P. 28(a)(9)(A). The courts of appeals have without exception interpreted that provision to establish a general prudential rule that "[a]n appellant waives any issue which it does not adequately raise in its initial brief." *Playboy Enters.* v. *Public Serv. Comm'n*, 906 F.2d 25, 40 (1st Cir.), cert. denied, 498 U.S. 959 (1990).[7] The courts

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[6] See, *e.g.*, *United States* v. *Rivera Pelau*, 861 F.2d 1522, 1526 n.9 (11th Cir. 1988) (pursuant to Rule 2 of the Federal Rules of Appellate Procedure, considering an issue raised only in co-defendant's brief, despite defendant's failure to adopt by reference his co-defendant's arguments); *Gramegna* v. *Johnson*, 846 F.2d 675 (11th Cir. 1988) (vacating judgment based on issue raised sua sponte by the court, pursuant to Rule 2); *United States* v. *Levy*, 391 F.3d 1327, 1335 (11th Cir. 2004) (Hull, J., concurring in denial of rehearing en banc) ("The issue is not whether this Court has the power to consider issues not raised in the initial brief; of course it does."), vacated, No. 04-8942, 2005 WL 540692 (June 6, 2005).

[7] Accord, *e.g.*, *United States* v. *Quiroz*, 22 F.3d 489, 490-491 (2d Cir. 1994) ("It is well established that an argument not raised on appeal is deemed abandoned, and we will not ordinarily consider such an argument unless manifest injustice otherwise would result.") (internal

of appeals have recognized that that rule is not jurisdictional, and therefore that courts have authority, in the exercise of their discretion, to address issues not timely raised by the parties. See, *e.g.*, *United States* v. *Miranda*, 248 F.3d 434, 443-444 (5th Cir. 2001) (noting that "the issues-not-briefed-are-waived rule is a prudential construct that requires the exercise of discretion" and that the court may consider an issue that was not timely raised "where substantial public interests are involved"), cert. denied, 534 U.S. 980 (2001) and 1086

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citations and quotation marks omitted); *Ghana* v. *Holland*, 226 F.3d 175, 180 (3d Cir. 2000) ("It is well settled that if an appellant fails to comply with these [Rule 28] requirements on a particular issue, he normally has abandoned and waived that issue on appeal.") (quoting *Kost* v. *Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993)) (alterations omitted); *Shopco Distrib. Co.* v. *Commanding Gen. of Marine Corps Base*, 885 F.2d 167, 170 n.3 (4th Cir. 1989) (holding that any claim not raised in a party's initial brief will be deemed waived) (collecting authorities); *United States* v. *Miranda*, 248 F.3d 434, 443 (5th Cir. 2001) ("Failure to satisfy the requirements of Rule 28 as to a particular issue ordinarily constitutes abandonment of the issue."), cert. denied, 534 U.S. 980 (2001) and 1086 (2002); *Bickel* v. *Korean Air Lines Co.*, 96 F.3d 151, 153 (6th Cir. 1996) ("We normally decline to consider issues not raised in the appellant's opening brief.") (quoting *Priddy* v. *Edelman*, 883 F.2d 438, 446 (6th Cir. 1989)), cert. denied, 519 U.S. 1093 (1997); *Holman* v. *Indiana*, 211 F.3d 399, 406 (7th Cir.) (finding arguments not raised in initial brief waived), cert. denied, 531 U.S. 880 (2000); *Sweat* v. *City of Fort Smith*, 265 F.3d 692, 696 (8th Cir. 2001) ("[C]laims not raised in an initial appeal brief are waived."); *Greenwood* v. *FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief."); *Adams-Arapahoe Joint Sch. Dist. No. 28-J* v. *Continental Ins. Co.*, 891 F.2d 772, 776 (10th Cir. 1989) (holding that "[a]n issue not included in either the docketing statement or the statement of issues in the party's initial brief is waived on appeal"); *Maryland People's Counsel* v. *FERC*, 760 F.2d 318, 319-320 (D.C. Cir. 1985) (deeming an issue waived where a party did not raise it until supplemental briefing).

(2002); *United States* v. *Quiroz*, 22 F.3d 489, 490-491 (2d Cir. 1994) (court will review issue not raised in the brief where manifest injustice would otherwise result); *Lee* v. *Murphy*, 844 F.2d 628, 634 (9th Cir. 1988) (same). See also Fed. R. App. P. 2 (granting courts discretion to suspend most rules for "good cause"). As noted above, see pp. 9-10, *supra*, the Eleventh Circuit specifically has recognized that it has the authority to relieve litigants of the consequences of default and address an issue on the merits where manifest injustice would otherwise result. In the exercise of its discretion, however, the Eleventh Circuit has declined to exempt *Booker* and *Blakely* claims from the operation of its longstanding rule that it will not consider claims unless they were timely raised in the appellant's opening brief. See, *e.g.*, *United States* v. *Dockery*, 401 F.3d 1261, 1262 (11th Cir. 2005) (involving *Booker* claims); *Levy*, 379 F.3d at 1243 n.3; see also *United States* v. *Ardley*, 242 F.3d 989, 990 (11th Cir.) (declining to exempt claims under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), from operation of rule), cert. denied, 533 U.S. 962 (2001).

Petitioner asserts (Pet. 18) that the Eleventh Circuit's application of the procedural bar rule "conflicts with the law in every other circuit" because other courts have reviewed the merits of challenges based on the intervening decisions of this Court in *Booker*, *Blakely*, and *Apprendi*, even if those challenges were not raised in the defendant's opening brief. The vast majority of decisions petitioner cites are inapposite. A few of the cited opinions simply conclude that it was appropriate under the circumstances to consider those claims in that posture because this Court recently had clarified the law, without citing or discussing the ordinary rule that courts will not entertain issues not raised in a party's opening

brief.[8] Most of the others simply discuss (and often reject) claims raised in supplemental briefs without even discussing the appropriateness of reviewing tardily raised claims.[9] Thus, it appears that most courts that have addressed claims in this posture have not explicitly declined to apply the procedural bar rule, and those decisions cannot be said to "conflict" with the decision below.

Petitioner cites only two cases (Pet. 18-19 & n.8) in which courts entertained a claim raised for the first time in supplemental briefing in light of intervening decisions of this Court that explicitly considered whether to apply the ordinary prudential rule that issues not raised in an opening brief will be deemed abandoned. That pur-

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[8] See *United States* v. *Oliver*, 397 F.3d 369, 377 n.1 (6th Cir. 2005) (concluding that it was appropriate to consider claim raised in letter filed pursuant to Fed. R. App. P. 28(j)); *United States* v. *Castro*, 382 F.3d 927, 929 & n.3 (9th Cir. 2004) (concluding that it was appropriate to consider claim sua sponte).

[9] See *United States* v. *Fox*, 396 F.3d 1018 (8th Cir. 2005); *United States* v. *Bruce*, 396 F.3d 697 (6th Cir.), vacated in part on reh'g, 405 F.3d 1034 (6th Cir. 2005); *United States* v. *Burgess*, 119 Fed. Appx. 852 (8th Cir. 2005); *United States* v. *Schaefer*, 384 F.3d 326, 330-331 (7th Cir. 2004); *United States* v. *Moore*, 109 Fed. Appx. 503, 505 n.2 (3d Cir. 2004) (denying motion to file supplemental brief "as futile" because claims of error were clearly meritless); *United States* v. *Delgado*, 256 F.3d 264, 280 (5th Cir. 2001); *United States* v. *Cernobyl*, 255 F.3d 1215 (10th Cir. 2001); *United States* v. *Terry*, 240 F.3d 65, 72-73 (1st Cir.), cert. denied, 532 U.S. 1023 (2001); *United States* v. *Poulack*, 236 F.3d 932, 935-938 (8th Cir.), cert. denied, 534 U.S. 864 (2001); *United States* v. *Rogers*, 118 F.3d 466, 471 (6th Cir. 1997). *United States* v. *Hammoud*, 381 F.3d 316, 344 & n.14 (4th Cir. 2004) (en banc), vacated on other grounds, 125 S. Ct. 1051 (2005), is inapposite because the supplemental briefing on *Blakely* in that case merely supported a timely *Apprendi* challenge that the defendant raised in his opening brief to judicial factfinding under the Guidelines.

ported conflict does not warrant this Court's consideration. Both cases discussed the issue only briefly in footnotes. See *United States* v. *Washington*, 398 F.3d 306, 312 n.7 (4th Cir. 2005); *United States* v. *Byers*, 740 F.2d 1104, 1115 n.11 (D.C. Cir. 1984). The court in *Washington*, without the benefit of briefing or argument on the subject by the parties, concluded that this Court's opinion in *Booker* "specifically mandated that [courts of appeals] 'must apply [*Booker*] . . . to all cases on direct review,'" 398 F.3d at 312 n.7 (quoting *Booker*, 125 S. Ct. at 769 (Breyer, J., for the Court)) (alterations in *Washington*), without noting that, in the very same paragraph, *Booker* made clear that "we expect reviewing courts to apply ordinary prudential doctrines" in determining whether resentencing in a given case was warranted. 125 S. Ct. at 769 (Breyer, J., for the Court). The Fourth Circuit should be given an opportunity to reconsider that erroneous conclusion in an appropriate case.[10] The *Byers* decision is over twenty years old, and the court may have exercised its discretion to proceed to the merits of the argument in that case only because the court concluded it clearly lacked merit. See 740 F.2d at 1118 ("obvious" that conditions necessary for relief not met); *id.* at 1121 (noting claim has been "uniformly rejected by other circuits"). More recent decisions of that court suggest that it does not consider itself obligated to consider tardily raised claims based on intervening precedent. See *Kinney* v. *District of Columbia*, 994 F.2d 6, 10 (D.C. Cir. 1993) (citing *Byers* for the proposition that "we have indicated that we *might* entertain a new argu-

[10] The government was unable to seek rehearing in *Washington* because the court of appeals, after the time for filing a petition for rehearing had expired, denied the timely filed joint motion of the parties for an extension of time in which to file a rehearing petition.

ment on appeal if it were justified by * * * an intervening change in the law") (emphasis added).

Review also is not warranted at this time because several courts of appeals currently are refining their analysis of when it is appropriate to consider tardily raised claims based on intervening precedent. The Fifth Circuit, which previously had entertained tardily raised claims based on intervening Supreme Court precedents,[11] recently has followed Eleventh Circuit precedent to conclude that "absent extraordinary circumstances, we will not consider *Booker* issues raised for the first time in a petition for rehearing." *United States* v. *Taylor*, No. 03-10167, 2005 WL 1155245 (5th Cir. May 17, 2005) (per curiam) (citing, *inter alia*, *Ardley*); *United States* v. *Hernandez-Gonzalez*, 405 F.3d 260, 261-262 (5th Cir. 2005) (per curiam) (citing, *inter alia*, *Levy*, 379 F.3d at 1242, and *Ardley*). The First Circuit, on the other hand, only last month concluded that the "substantial change in the applicable law wrought by the Supreme Court's decisions in *Blakely* and *Booker* * * * constitutes an 'exceptional circumstance'" in which the court would decline to apply its general rule that tardily raised issues "are generally considered waived." *United States* v. *Vazquez-Rivera*, 407 F.3d 476, 487 (1st Cir. 2005).

b. Even if the courts of appeals were to settle on differing approaches to when to address claims not raised in a defendant's opening brief, rules governing the consideration of unpreserved claims may appropriately be viewed as local rules that can differ from circuit to circuit. So long as such local rules are reasonable, see

[11] See *Miranda*, 248 F.3d at 443-444 (discussing *Apprendi* claim although defendant did not raise claim in opening brief); *United States* v. *Garcia*, 242 F.3d 593, 599 & n.5 (5th Cir. 2001) (same).

Thomas v. *Arn*, 474 U.S. 140, 146-148 (1985), and consistent with Acts of Congress and the Federal Rules of Appellate Procedure, see Fed. R. App. P. 47(a), there is no requirement of "uniformity among the circuits in their approach to [such] rules." *Ortega Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993). Indeed, this Court specifically has acknowledged the power of courts of appeals to adopt rules restricting the consideration of issues not raised in a timely manner. In *Thomas* v. *Arn*, *supra*, this Court held that the Sixth Circuit had not abused its discretion by promulgating a rule that a party waived the right to appellate review of a district court judgment that adopted a magistrate's recommendation when the party had failed to file objections with the district court identifying those issues on which review was desired. The Sixth Circuit's "nonjurisdictional waiver provision," like the rule at issue here, would ordinarily "preclud[e] appellate review of any issue" not raised in the manner prescribed, although the court of appeals could "excuse the default in the interests of justice." 474 U.S. at 147-148, 155. Noting that such a rule was supported by sound considerations of judicial economy, *id.* at 148, this Court concluded that the courts of appeals had authority to adopt "procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution." *Id.* at 146-147 (quoting *Capp* v. *Naughten*, 414 U.S. 141, 146 (1973)).

Procedural bar rules of the sort at issue here promote efficiency by avoiding piecemeal briefing of appeals and ensuring that the appellee has the opportunity to respond to all issues raised by the appellant without supplemental briefing. Such rules are especially important because of the courts of appeals' increasingly heavy

caseloads. Petitioner contends (Pet. 13 n.4, 22) that the court of appeals' rule should be rejected because it would give litigants an incentive to raise numerous claims that are precluded by existing precedent. Although the same could be said of any procedural default rule that attaches consequences to the failure to raise a claim, this Court rejected the position that the futility of raising a claim under existing law wholly excuses a litigant from preserving it. See, *e.g.*, *Johnson*, 520 U.S. at 467-468 (reviewing unpreserved claim only for plain error although the argument was foreclosed by "near-uniform precedent both from this Court and from the Courts of Appeals"). See also *United States* v. *Levy*, 391 F.3d 1327, 1332 (11th Cir. 2004) (Hull, concurring in the denial of rehearing en banc) ("If defendants were going to raise a long and useless laundry list of objections, they already would have been doing exactly that in the district court so objections could receive full *de novo* review [on appeal], rather than plain-error review."), vacated, No. 04-8942, 2005 WL 540692 (June 6, 2005); *id.* at 1333 (noting that "numerous defendants" had properly preserved their claims by "rais[ing] *Apprendi*-type arguments in their challenges to enhancements under the federal Sentencing Guidelines") (collecting cases).

This Court has denied review in a number of cases in which the Eleventh Circuit declined to entertain a claim under the intervening decisions in *Blakely* or *Apprendi* solely because it was not raised in the petitioner's opening brief, see, *e.g.*, *Ardley* v. *United States*, 535 U.S. 979 (2002) (No. 01-8714); *Nealy* v. *United States*, 534 U.S. 1023 (2001) (No. 01-5152); *Padilla-Reyes* v. *United States*, 534 U.S. 913 (2001) (No. 01-5284), and denied review in several cases that specifically challenged application of the procedural bar rule in that context. See,

e.g., *Phillips* v. *United States*, 536 U.S. 961 (2002) (No. 01-5718) (denying review when petitioner challenged application of rule to bar consideration of *Apprendi* claim); *Garcia* v. *United States*, 534 U.S. 823 (2001) (No. 00-1866) (denying review when Eleventh Circuit declined, on remand from this Court for reconsideration in light of *Apprendi*, to consider claim because it was not raised in initial brief); see also *Thompson* v. *United States*, 535 U.S. 1114 (2002) (No. 01-8603) (challenging application of rule to bar consideration of ex post facto claim). There is no reason for a different result in this case.

3. Petitioner also contends (Pet. 5-10) that "this Court should grant the petition for a writ of certiorari, vacate the judgment, and remand the case to the Eleventh Circuit for further consideration in light of *Booker*." Pet. 6. This Court previously granted, vacated, and remanded for further consideration in light of *Booker* in a case involving one of petitioner's co-defendants, see *Pierce* v. *United States*, 125 S. Ct. 1430 (2005) (No. 04-8442), and has recently done so in other cases raising the same issue. See *Heabree* v. *United States*, No. 04-1210, 2005 WL 575559 (June 13, 2005); *Dixon* v. *United States*, No. 04-8932, 2005 WL 540062 (June 6, 2005); *Levy* v. *United States*, No. 04-8942, 2005 WL 540692 (June 6, 2005). Because the court of appeals confirmed in *United States* v. *Dockery*, 401 F.3d at 1262, that a remand for further consideration in light of *Booker* does not alter the court of appeals' application of its longstanding rule that issues not raised in an appellant's opening brief are deemed abandoned, there is no reason for this Court to remand petitioner's case for reconsideration in light of *Booker*. Accord, *e.g.*, *United States* v. *Mosley*, No. 04-11189, 2005 WL 1317026 (11th

Cir. June 2, 2005) (reinstating original judgment after this Court granted certiorari, vacated judgment, and remanded for further consideration in light of *Booker*); *United States* v. *Senn*, 128 Fed. Appx. 96 (11th Cir. 2005) (same); see also *Taylor*, 2005 WL 1155245, at *1 (on remand from this Court for reconsideration in light of *Booker*, Fifth Circuit reinstated original judgment because defendant raised *Booker* argument for the first time in petition for a writ of certiorari and "extraordinary circumstances" did not warrant relief).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
JOHN C. RICHTER
Acting Assistant Attorney General
ELIZABETH A. OLSON
Attorney

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No. 04-1224

In The

Supreme Court of the United States

GARLAND HOGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY IN SUPPORT OF HOGAN'S PETITION FOR WRIT OF CERTIORARI

DAVID OSCAR MARKUS
HIRSCH & MARKUS, LLP
Counsel Of Record For Petitioner
9130 S. Dadeland Blvd. Ste. 1200
Miami, Florida 33156
Telephone (305) 670-0077
Facsimile (305) 670-7003
www.hirschmarkus.com

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REPLY ARGUMENT

Introduction

The Solicitor General's ("Respondent") response[1] is a tale of two briefs. On the one hand it asserts that Mr. Hogan's petition should be denied outright because the Eleventh Circuit's procedural default rule is not as rigid as Hogan makes it out to be (Response at p. 6, 10). On the other hand, it contends that the Court should not remand the case, as it has done in every similar case, because the Eleventh Circuit rule is so rigid that Mr. Hogan will never obtain relief in the court below (Response at p. 18).

The Response demonstrates that, at the very least, the Court should grant Mr. Hogan's petition for writ of certiorari, vacate the judgment below and remand for further proceedings as the Court has done in every similar case, including the co-petitioners in this case (Response at p. 18). In the alternative, the Court should grant the writ of certiorari to settle the admitted circuit split on this issue (Response at p. 13-15) and to correct the anomalous rule in the Eleventh Circuit that ignores this Court's cases. *See United States v. Vanorden*, No. 03-11083, 2005 WL 1531151 at *16 (11th Cir. June 30, 2005) (Tjoflat, J. specially concurring) ("Hopefully, . . . the Supreme Court will soon correct this practice," which former Chief Judge Tjoflat describes as both "strange [and] bad").

Judge Tjoflat, continuing to express his frustration with the Eleventh Circuit's outlandish rule, recently asked this Court to correct this practice, arguing:

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[1] We will cite to Respondent's response as follows: "Response at p.___".

> This is a strange rule we have: in a case in which the Supreme Court has vacated our decision 'for further consideration in light of [Booker]' precisely *because* we did not have the benefit of *Booker* when we rendered our first decision, we decline to actually consider the *Booker* issue on the ground that it was not raised when we issued that first decision. As I have explained elsewhere, it is also a very bad rule, as it is not only inconsistent with Supreme Court precedent and the law of every other circuit, but also encourages defendant-appellants to raise frivolous claims that are squarely foreclosed by circuit and Supreme Court precedent on the off chance that an unanticipated decision will make them suddenly viable.

Id. at *5-6 (citations omitted).

1. As an initial matter, Mr. Hogan's sentence was indisputably increased by a judge's factual findings by a preponderance of the evidence rather than by a jury's findings based on a beyond a reasonable doubt standard, over Hogan's *Apprendi* objection at sentencing. Respondent does not dispute that this sentence, determined under mandatory Federal Sentencing Guidelines, violates both the Sixth Amendment and this Court's decisions in *United States v. Booker*, 125 S. Ct. 738 (2005) and *Blakely v. Washington*, 124 S. Ct. 2531 (2004). Respondent also concedes that this Court previously has granted petitions for a writ of certiorari, vacated judgments, and remanded similar cases and the cases of co-petitioners for further consideration in light of *Booker*,[2] (Response at p. 20), and

[2] *See United States v. Pierce*, 125 S. Ct. 1430 (2005) (co-defendant to Garland Hogan); *Hembree v. United States*, No. 04-1210, 2005 WL

(Continued on following page)

has recommended that this Court do so for co-petitioners in which petitions for certiorari are pending.[3]

Nevertheless, Respondent contends that this Court should single out Mr. Hogan and deny review in his case because Mr. Hogan did not adopt the *Apprendi* argument of his co-petitioners in the court below. *Id.*[4] Respondent, however, simply missed the fact that Mr. Hogan *did* move to adopt "all" arguments, motions, petitions, and pleadings filed by co-appellants. *See* C.A. Docket Entries for 7/22/04, attached as App. 121-124. The Eleventh Circuit granted this motion on December 17, 2004. *See* C.A. Docket Entries for 12/17/04 at App. 44-45. ("Appellants' motions to adopt are GRANTED.").[5] Accordingly, there is no reason for Respondent to pick on Mr. Hogan as he (just like his

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575559 (June 13, 2005); *Dixon v. United States*, No. 04-8932, 2005 WL 540062 (June 6, 2005); *Levy v. United States*, 125 S. Ct. 2542 (2005) No. 04-8942, 2005 WL 540692 (June 6, 2005), opinion reinstated in *Levy v. United States*, No. 01-17133 2005 WL ___ (11th Cir. July 12, 2005).

[3] *See, e.g.*, Consolidated Brief for the United States in *Alan Richard Lewis, Wanda Tirado, and Zane Balsam v. United States*, Nos. 04-9239, 04-9307 and 04-9331.

[4] *See* Respondent Br. at p. 3, n.3 (mistakenly stating that Hogan, unlike the other petitioners, "evidently did not" adopt co-defendant Balsam's *Apprendi* argument in the court of appeals).

[5] When undersigned counsel informed Respondent of this motion and order, Respondent took the position that motion to adopt "all" co-defendants' previously filed pleadings, motions and arguments was only a motion to adopt "some" pleadings. The definition of the word "all", however, can hardly be in dispute. *See* www.dictionary.com (defining the word "all" as "being or representing the entire or total number, amount, or quantity"; "being the utmost possible"; and "any whatsoever, beyond all doubt"). There is no dispute that Petitioner's motion to "adopt any and all pleadings filed by his co-appellants," *see* App. 122, was granted by the Eleventh Circuit.

co-petitioners) adopted the *Apprendi* argument made by co-defendant Balsam.

Even if Hogan did not adopt the arguments of co-petitioners (which he clearly did), this Court should remand for further consideration as it has done with countless other similarly situated petitions. Respondent argues that a remand would be fruitless due to the Eleventh Circuit's procedural default rule. This Court rejected the exact same argument in *Levy v. United States*, 125 S. Ct. 2542 (2005) (GVRing case over Solicitor General's objection that a GVR would be futile). And the Court did so for good reason – Respondent's reasoning prematurely presumes the outcome of the lower court's decision on remand, especially in this case where at least some, if not all, of the co-petitioners have preserved the issue. *See, e.g., United States v. Rivera Pedin*, 861 F.2d 1522, 1526 n.9 (11th Cir. 1988) (pursuant to Rule 2 of the Federal Rules of Appellate Procedure, considering an issue raised only in a co-defendant's brief, despite defendant's failure to adopt by reference his co-defendant's arguments, to prevent manifest injustice). Accordingly, there can be no real dispute that at a bare minimum, this Court should grant Mr. Hogan's petition, vacate his sentence, and remand his case to the Eleventh Circuit for further consideration.

2. If Respondent's guess is correct – that on remand the Eleventh Circuit will simply reapply its anomalous procedural default rule – it demonstrates that review is necessary so that the Court: 1) can ensure that its cases are being followed and not ignored (as is being done by the Eleventh Circuit); 2) can settle a circuit split on the issue; and 3) can preserve judicial and litigant resources that are required to deal with frivolous issues under the Eleventh Circuit rule.

a. The Eleventh Circuit's procedural default rule conflicts with *Griffith v. Kentucky*, 479 U.S. 314 (1987) and *Booker* itself. *See* Hogan's Pet. at pgs. 16-17. Respondent's attempt to distinguish *Griffith* by arguing that the defendant there actually raised the issue below is simply not an accurate distinction as Mr. Hogan raised the *Apprendi* argument before the sentencing judge and (as explained above) preserved it in the court of appeals.

In any event, neither *Griffith* nor *Booker* require a litigant to have raised the issue below. *See, e.g., Booker*, 125 S. Ct. at 769 (holding that the two rules announced in *Booker* "must" be applied to "all cases" on direct review); *Griffith*, 479 U.S. at 328 ("a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final."). Respondent correctly points out that the *Booker* court "expect[ed] reviewing courts to apply ordinary prudential doctrines" *Booker*, 125 S. Ct. at 769, but the Eleventh Circuit's rule is anything but ordinary or prudential. *See Vanorden*, 2005 WL 1531151 at *8 (Tjoflat, J., specially concurring) (finding that the rule "is not an 'ordinary prudential doctrine'; in fact, it is a quite extraordinary rule in that we invented it only four years ago and it has not been followed by any other circuit").

Respondent's citation (at p. 7) to *Shea v. Louisiana*, 470 U.S. 51, 58 n.4 (1985), for the proposition that *Griffith* and *Booker* are "subject, of course, to established principles of waiver, harmless error, and the like" is without merit as those qualifications of the general principle do not implicate this case. As explained below, Mr. Hogan cannot be said to have done anything that can plausibly be construed as a "waiver." Regardless, *Shea*, decided two years before *Griffith*, involved the appropriateness of

treating defendants bringing claims under collateral review differently from those raising claims under direct review. *Id.* at 60-61. The Court reasoned that "the distinction . . . properly rests on considerations of finality in the judicial process." *Id.* at 59. The Court did not suggest that defendants, who raise previously unavailable claims in supplemental briefs, are not similarly situated to defendants who raised previously known claims. The *Shea* Court did not implicate the *Griffith/Booker* rule that a new decision concerning the conduct of criminal prosecutions applies to all cases on direct review, such as Mr. Hogan's case.

b. The Eleventh Circuit's position also conflicts with *United States v. Olano*, 507 U.S. 725 (1993) and Rule 52(b) of the Federal Rules of Criminal Procedure. Hogan's Pet. at pgs. 19-21. Respondent takes issue with this claim asserting that one prudential doctrine in *Booker* and *Griffith* is waiver. (Response at p. 9). There is no question that waiver can and should be considered. But waiver certainly does not apply to Hogan's case or any of the other litigants in the Eleventh Circuit who are being subjected to its anomalous rule. Hogan has done nothing that can plausibly be construed as waiver. As this Court has explained, "[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a *known* right.'" *Olano*, 507 U.S. at 733 (emphasis added). Judge Tjoflat explains in the *Vanorden* case this exact point, which applies with equal force to Hogan's case:

> Thus, while Vanorden did forfeit his *Booker* claim by failing to 'timely assert[]' it – which means that review in his case should be for plain error only – it is clear that he has not 'waived' it. At

> the time the supposed waiver took place – when Vanordern's lawyer filed his initial brief in April 2003 – *Blakely and Booker* had not yet been decided, and this circuit and every other had squarely rejected *Blakely/Booker*-type arguments. It, therefore, makes no sense to say that Vanorden 'intentional[ly] relinquish[ed]' a 'known' Sixth Amendment right.

Vanorden, 2005 WL 1531151 at *9. *See also* Hogan Pet. at 19-21 (making the same point). Respondent's failure to address the difference between waiver and forfeiture demonstrates the strength of Hogan's position.

c. Respondent takes issue with our claim that the Eleventh Circuit's procedural default rule conflicts with the other circuits' decisions. This Court need not take our word for it. Take Judge Tjoflat's word: "[The rule in the Eleventh Circuit] is . . . inconsistent with Supreme Court precedent and the law of *every* other circuit." *Vanorden*, 2005 WL 1531151 at *8 (emphasis added).

Respondent does concede that a conflict exists between the Eleventh Circuit on one side and a number of other circuits on the other side. Respondent Br. at p. 14-15 (citing *United States v. Washington*, 398 F.3d 306, 312 n.7 (4th Cir. 2005) ("Although appellate contentions not raised in an opening brief are normally deemed to have been waived, the *Booker* principles apply in this proceeding because the Court specifically mandated that we 'must apply [*Booker*] . . . to all cases on direct review.'" (citation omitted); *United States v. Byers*, 740 F.2d 1104, 1115 n.11 (D.C. Cir. 1984) (Scalia, J.); *United States v. Vazquez-Rivera*, 407 F.3d 476, 487 (1st Cir. 2005) ("[S]ubstantial change in the applicable law wrought by the Supreme Court's decisions in *Blakely* and *Booker* . . . constitutes an

'exceptional circumstance'" in which the court would decline to apply any default rule)). The Ninth Circuit also recently joined these circuits in the one-sided circuit conflict. *See United States v. Ameline*, 2005 WL 1291977, at *11 (9th Cir. June 1, 2005) (en banc) ("*Booker* explicitly stated that its holding applies to all cases pending on direct appeal. . . . Even where the briefs filed by the parties do not raise a *Booker* objection, we conclude that the issue may be raised and should be considered."). At the very least then, there is a 4-1 circuit split on the issue. But the split is even more stark than that.

Respondent suggests that the other conflicting circuit cases are not true conflicts because in those cases the courts "simply discuss the claims raised in supplemental briefs without even discussing the appropriateness of reviewing tardily raised claims." (Response at p. 14, n.9). First, Respondent clearly erred in listing *United States v. Rogers*, 118 F.3d 466 (6th Cir. 1997) among in this group of cases. In *Rogers*, the Sixth Circuit discussed the procedural bar rule at length, determining that the defendant "could not have knowingly waived a constitutional right that evolved after he filed his appellate brief because raising the issue would have been futile in light of then-applicable precedent." *Id.* at 471. The split, at the very least, therefore, is 5-1.

The Second, Third, Fifth,[6] Seventh, and Eighth Circuits also have permitted litigants to raise issues for the first time after the initial brief has been filed in

[6] *But see United States v. Taylor*, No. 03-10167, 2005 WL 1155245 at *1 (May 17, 2005) (concluding that "absent extraordinary circumstances, [it would] not consider *Booker* issues raised for the first time in a petition for rehearing").